No. 12,668

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and E. J. ODERMATT,
Appellees.

BRIEF FOR APPELLEE STANDARD OIL COMPANY OF CALIFORNIA.

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BRIEF FOR APPELLEE STANDARD OIL COMPANY OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

This appellee concurs in the jurisdictional statement contained in appellant's brief.

STATEMENT OF THE CASE.

Appellee Standard Oil Company of California* finds it necessary to make its own statement of certain aspects of the case in order to clarify appellant's statement (Br. 2-7).

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*This appellee will hereinafter be referred to as "Standard."

The testimony of E. J. Odermatt shows that, under contract with Standard, he was an independent contractor engaged in business as a wholesale distributor of Standard Oil products throughout a certain territory in the vicinity of Wells, Nevada. Under express provision of the wholesale distributor agreement (Standard's Exh. A; identified R. 67; admitted R. 74; quoted R. 69) and in actual practice, Standard had no control over the manner in which he conducted his business (R. 69-73). The jury was properly instructed as to the legal test of control for determining whether he was in fact an independent contractor as distinguished from a servant (Instructions Nos. 15, 16; R. 34-37). The court refused a requested instruction (Plaintiff's Instruction No. 1 (Refused); R. 22a) based upon liability of a putative principal under a rule of ostensible agency, as there was no evidence of any representation by Standard that Odermatt was its servant, or of any reliance by appellant on any such representation.

The sequence of events leading up to the outbreak of the fire, according to the testimony of Nielson, the driver of Odermatt's truck, is more properly stated as follows: Upon his arrival at the plaintiff's premises, Nielson drove the truck beneath the canopy beside the inside storage tank (R. 406). There he stopped and shut off the motor (R. 409). Having measured both storage tanks, he next connected the delivery hose to the inside storage tank and drained all of one delivery tank on the truck and part of another (R. 410). Having filled the inside tank, Nielson disconnected and drained the delivery hose, moved the truck to the outside storage tank, shut off the motor and commenced delivery there (R. 410-414). While the gas-

oline was draining into the outside storage tank, Nielson entered the bar briefly to purchase a soft drink and returned to the truck (R. 418-419, 440-441). He stayed next to the truck during the remainder of the delivery, which was completed without incident, shifting the hose to another delivery tank on the truck when the first had been exhausted (R. 415). *After delivery, he disconnected, drained and laid the hose down next to the pump block* and reentered the bar for the purpose of filling out the invoice. Before this was accomplished, flames were suddenly noticed up under plaintiff's canopy, which extended out from his building over the gas pump (R. 422).

Appellant's statement of facts, based on Moseley's and Klitz's testimony, appears to indicate that Nielson returned to the bar immediately after moving the truck and was still in the bar when the fire broke out (Br. 4). That this is quite impossible is borne out by the fact that in order to fill the outside storage tank, the contents of more than one delivery tank on the truck were required: how the hose could switch from one delivery tank to another to accomplish this, appellant has failed to explain.

As appellant states, both Standard and Odermatt moved for a directed verdict at the close of plaintiff's case on the ground that the evidence failed to establish negligence and the proximate cause of the fire.* Deeming the doctrine of *res ipsa loquitur* applicable, the court denied these motions.

Defendants then introduced evidence showing that the fire was not caused by any negligence on the part of the

*Standard made a separate motion not pertinent to the appeal.

driver of the truck. Defendants also showed there were numerous instrumentalities under appellant's own control that might have caused the fire (see argument, *infra*).

Among the defense witnesses was Jacob Ryan, who testified as an expert on the characteristics and inflammability of petroleum products (R. 498-513). It is not correct, as appellant states (Br. 6), that this witness answered any question based on his hearing and observation of the testimony in the case. An objection to one such question was sustained and the question was not answered (R. 522).

There are discussed in the argument herein the questions suggested in appellant's statement of the case regarding the court's "Explanation Requested by Jury of Instruction No. 22" (R. 23-25).

SUMMARY OF ARGUMENT.

I. The trial court properly refused Plaintiff's Requested Instruction No. 1 (Refused) (R.22a) in that it has no basis in the evidence and could only serve to mislead the jury. In any case, refusal of this instruction cannot be assigned as error, for failure to state at the trial the grounds of objection to the refusal.

II. The court's "Explanation Requested by the Jury of Instruction No. 22" (R.23) as to the plaintiff's burden of proof under the rule of *res ipsa loquitur* could not have misled or confused the jury to appellant's prejudice. Here also, the giving of this explanatory instruction cannot be assigned as error, for failure to state at the trial the grounds of objection.

A. Appellant could not have been prejudiced since he received the benefit of the doctrine of *res ipsa loquitur,* to which he was not entitled.

B. The court's inclusion of the sentence, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," neither results in a conflict between Instructions No. 21 and No. 22, nor in any way increases the burden of proof which appellant was properly required to sustain, even under *res ipsa loquitur.*

C. Not having objected to Instructions No. 21 or No. 22 at the trial, appellant cannot now be heard to claim that their effect was to confuse or mislead the jury.

III. Even if *res ipsa loquitur* were applicable, the jury was not compelled to accept the inference of defendant's negligence and, in any event, adequate rebuttal evidence exists to sustain the verdict. The verdict therefore cannot be disturbed on appeal.

IV. The trial court committed no error in permitting witness Ryan to testify concerning a fundamental issue of the case, since his answer was in response to a question which was properly based on facts to which plaintiff had made no previous objection.

ARGUMENT.

I. **THE TRIAL COURT PROPERLY REFUSED PLAINTIFF'S INSTRUCTION NO. 1 (REFUSED) (R. 22a) IN THAT IT HAS NO BASIS IN THE EVIDENCE AND COULD ONLY SERVE TO MISLEAD THE JURY. IN ANY CASE, REFUSAL OF THIS INSTRUCTION CANNOT BE ASSIGNED AS ERROR, FOR FAILURE TO STATE AT THE TRIAL THE GROUNDS OF OBJECTION TO THE REFUSAL.**

Appellant's first specification of error is the trial court's refusal to give Plaintiff's Requested Instruction No. 1 (Refused) (R.22a). Appellant failed to object specifically to the court's refusal to give appellant's requested instruction, contenting himself with a general exception without a statement of his grounds (R. 537). For such failure he cannot now assign as error the refusal to give this instruction to the jury. It is clear that only where the trial court is advised specifically of the grounds of objection to a refusal to give an instruction can such refusal be assigned as error.

Rule 51, Fed. Rules Civ. Proc.;

Palmer v. Hoffman (1943) 318 U.S. 109, 119.

Although appellant is thus precluded from urging his objection here, we shall consider the merits of his contention. Each of the cases cited by appellant in support of this specification of error (Br. 12-15) stands for the principle that it is error to refuse a requested instruction when it is *both* a correct statement of the law *and* is applicable to the case. These cases simply emphasize the fundamental defect in appellant's position: the lack of any evidence in the record which could possibly sustain the instruction.

It is clear that the court may refuse any instruction which states no principle of law that can materially aid the jury in arriving at its decision (*Lefkoff v. Sicro* (1939) 189 Ga. 554, 6 S.E. 2d 687, 133 A.L.R. 738), which might mislead the jury (*Guerni Stone Co. v. Carlin* (1916) 240 U.S. 264), or which lacks substantial basis in the evidence (*United Shoe Machinery Corporation v. Paine* (1928) 26 F.2d 594; *McCarthy v. Pennsylvania R. Co.* (7 Cir. 1946) 156 F.2d 877, certiorari denied (1947) 329 U.S. 812; *McCulloch v. Horton* (1937) 105 Mont. 531, 74 P.2d 1, 114 A.L.R. 823). The instruction requested by appellant would in no way assist the jury, could easily mislead them, and fails in any respect to apply to the evidence.

The legal principle embodied in appellant's refused instruction would impose liability on a party for the harm caused by another who is not in fact a servant, where the putative principal has nevertheless *represented* that the actor is his servant, thereby causing the plaintiff *justifiably* to *rely* upon the care or skill of the actor. In the case cited by appellant as authority for this legal principle (*Montgomery Ward & Co. v. Stevens* (1941) 60 Nev. 358, 109 P.2d 895), the facts showed that the defendant, Montgomery Ward & Co., represented to the plaintiff that the actor was its servant and that he was a capable individual, and showed the plaintiff's reliance on such representations, to his injury. The court stressed the requirement of both representation and reliance for the imposition of liability.

Authority elsewhere is in accord in requiring proof of both representation and reliance as the essential ingredients for establishing an ostensible agency in tort actions.

Donelly v. S. F. Bridge Co. (1897) 117 Cal. 417, 49 Pac. 559;

Lowmiller v. Monroe, Lyon & Miller, Inc. (1929) 101 Cal.App. 147, 281 Pac. 433, 282 Pac. 537;

Armstrong v. Barceloux (1917) 34 Cal.App. 433, 167 Pac. 895;

Standard Oil Co. v. Gentry (1941) 241 Ala. 62, 1 So. 2d 29;

Restatement of Agency, secs. 265, 267.

Section 265 of the Restatement of Agency strongly states the requirement of reliance:

> "Except where there has been reliance by a third person upon the appearance of agency, one who has manifested that another is his servant or other agent does not thereby become liable for the other's tortious conduct, although it is apparently authorized or is within the apparent scope of employment."

Nowhere in the record in this case is there any indication that Standard represented in either word or deed to appellant that Odermatt, the wholesale distributor of its products, was Standard's servant or agent, nor in any way made any representation as to his care or skill; nor does the evidence indicate any reliance by appellant upon any such representation. On the contrary, as later discussed (infra, pp. 10-12), the evidence affirmatively shows knowledge by appellant that Odermatt was not the servant or agent of Standard.

Appellant's argument simply assumes that the essential requirements of representation and reliance exist. Appellant makes passing references to the record without any explanation (Br. 14). Analysis of these references shows they do not support his contention.

The references to pages 3, 9 and 18 of the record merely allude to the contested allegations of agency in the pleadings. Pages 259-262 of the record show only appellant's testimony that he had been selling products of Standard under a dealer agreement with it. He gave no testimony whatever concerning any representation by Standard as to Odermatt's status or his skill or care. The dealer agreement itself (Pl. Exh. 10) which was identified by appellant during this testimony, discloses simply an agreement by Standard to sell and deliver petroleum products to appellant. The agreement is silent as to the means or instrumentalities by which the delivery should be made. It cannot be inferred from such agreement that delivery was to be made by an employee; for in ordinary commercial intercourse delivery of products that a seller has contracted to supply to a buyer is commonly made through an independent contractor such as rail or other common carrier, a parcel delivery service, a local express service, and even through the Post Office Department of the United States Government. There is nothing in the record to show that practice in the petroleum industry is different in any way from ordinary commercial practice.

Moreover, the dealer agreement (Pl. Exh. 10, par. 11) discloses appellant's recognition of his own status as an

independent contractor in his business as a retail distributor of Standard products. Appellee Odermatt is simply a distributor at the wholesale level of distribution. Appellant, whose own contract contains his recognition that he was an independent contractor, must have been aware that distributors at the wholesale level of distribution might well occupy the same status.

Appellant further referred to pages 301-302 where he identified plaintiff's exhibits 1 to 4 as representing the typical documents involved in the business transactions between himself and the manufacturer of the petroleum products he sold. He testified to no facts indicating the existence of, or any reliance upon, statements or conduct of Standard as to the employee status of the distributor delivering these products. These exhibits themselves reveal no such representation by Standard. Plaintiff's exhibit 1, the invoice for petroleum products delivered, naturally bears the name of Standard since it was the seller of the products and payment for the products was due to it. Naturally also, the invoice was signed by the distributor's employee Nielson who, as the person actually making the delivery, is the only one to sign such an invoice.

Plaintiff's exhibit 2 is an acknowledgment for delivery receipts given by appellant to the person who brought the gasoline to his premises. Such delivery receipts, evidencing appellant's sales to holders of Standard's credit cards, were accepted by Standard in lieu of cash in payment for the petroleum products delivered (R. 301). Plaintiff's exhibit 4 is a receipted invoice for appellant's payment to Standard of rent for the pumps and tanks

owned by it. Of course, these forms (Pl. Exh. 2, 4) bear Standard's name since they relate to financial incidents of the business relationship between Standard as a seller, and appellant as a buyer and a retail distributor of petroleum products. That these forms were signed by Odermatt, the wholesale distributor, is without significance. This indicates merely that Odermatt, the wholesale distributor, had been authorized by Standard to handle money matters incident to his making delivery of petroleum products. From such authority no conclusion can be drawn that Odermatt either did or did not stand in the relationship of servant to Standard.

Plaintiff's exhibit 3 is nothing more than a cancelled check given by appellant and payable to Standard in payment for petroleum products. This shows nothing as to the status of Odermatt.

Thus there is nowhere in the portions of the record referred to by the appellant, or elsewhere, any indication of a representation by Standard that Odermatt was its employee, or any reliance by appellant on any representation. The record does show knowledge by appellant of Odermatt's status as an independent contractor. Plaintiff's exhibit 27 is a picture of the tank truck used by Odermatt for delivering petroleum products to appellant's premises (R. 524). The name of Standard, or any of its products, does not appear on the truck. There is prominently displayed upon the right door of the truck's cab the legend:

"E. J. Odermatt
Wholesale Distributor
Wells, Nev."

Moreover, the evidence shows that while appellant, by check payable to Standard, paid for petroleum products at the Wells, Nevada, price, separate payments were made to and retained by Odermatt at the rate of 2 cents per gallon representing the differential for delivery from Wells, Nevada, to appellant's premises at Contact, Nevada (R. 72-73). Separate compensation by appellant to Odermatt for the delivery differential is wholly incompatible with any possible assumption by appellant that Odermatt was acting otherwise than as an independent businessman. In addition, appellant's manager Mr. Moseley (R. 86) recognized Odermatt's independent status. He testified the petroleum products for appellant's premises, products manufactured by Standard, were procured from Mr. Odermatt (R. 87-88). This is not the language of one dealing with a mere employee of the oil company.

We submit that upon this record the refused instruction has no foundation in the evidence, would not have aided the jury in arriving at its decision, and could only have misled the jury. The instruction was properly refused. In any event, as first above stated, its refusal cannot be assigned as error.

II. THE COURT'S "EXPLANATION REQUESTED BY JURY OF INSTRUCTION NO. 22" (R. 23) AS TO THE PLAINTIFF'S BURDEN OF PROOF UNDER THE RULE OF RES IPSA LOQUITUR COULD NOT HAVE MISLED OR CONFUSED THE JURY TO APPELLANT'S PREJUDICE. HERE ALSO THE GIVING OF THIS EXPLANATORY INSTRUCTION CANNOT BE ASSIGNED AS ERROR, FOR FAILURE TO STATE AT THE TRIAL THE GROUNDS OF OBJECTION.

A. Appellant could not have been prejudiced since he received the benefit of the doctrine of res ipsa loquitur, to which he was not entitled.

Appellant complains of error committed by the court in explaining to the jury the nature of the burden of proof required of a plaintiff in a case involving the doctrine of *res ipsa loquitur*. Appellant at the trial took only a general exception to one sentence in this explanation (R. 537). His grounds for objection were not stated, and he is therefore precluded from assigning as error the giving of this explanatory instruction.

Rule 51, Fed. Rules Civ. Proc.;
Palmer v. Hoffman (1943) 318 U.S. 109, 119.

To discuss the details of appellant's contention: By reason of the trial court's application of the doctrine of *res ipsa loquitur* (Instruction No. 22, R. 41-42), appellant's case was submitted to the jury under instructions far more favorable than those to which appellant was actually entitled. Appellant therefore could not have been prejudiced by an instruction which imposed on him a burden of proof no more onerous than that which he properly bore, namely, the burden of proving by a preponderance of the evidence that there was negligence of the defendants and that such negligence was the proximate cause of the plaintiff's damage.

The doctrine of *res ipsa loquitur* does not apply to a fire arising from delivery of gasoline upon the plaintiff's premises, since it is clear that the inference of negligence cannot arise unless all the possible causes of the accident are within the control of defendant.

Weaver v. Shell Co. (1936) 13 Cal.App.2d 643, 57 P.2d 571;

Langhoop v. Richfield Oil Corporation of New York (1940) 259 App.Div. 964, 21 N.Y.S.2d 416;

Starks Food Markets v. El Dorado Refining Co. (1943) 156 Kan. 577, 134 P.2d 1102;

Bruening v. El Dorado Refining Co. (W.D.Mo. 1943) 53 F.Supp. 356.

Under circumstances remarkably similar to those involved in the present case, the California Supreme Court in *Weaver v. Shell Co.,* supra, stated that *res ipsa loquitur* could not properly apply to a fire of unknown origin arising during the delivery of gasoline from the defendant's truck at the plaintiff's premises, since the nature of the accident fails to exclude all inferences as to the cause of the fire except the defendant's negligence. Also under similar circumstances, the United States District Court for the Northern Division of Iowa, holding *res ipsa loquitur* inapplicable, stated that the *res ipsa loquitur* situation most commonly arises where the *plaintiff* is injured on the premises of the *defendant;* in the gasoline delivery cases, the reverse is normally true, making it inappropriate to apply the doctrine.

Highland Golf Club v. Sinclair Refining Co. (N.D. Iowa 1945) 59 F.Supp. 911.

It is clear that appellant received the advantage of a doctrine to which he was not entitled under the facts. It is likewise clear that the court's explanation of Instruction No. 22 could not have prejudiced appellant.

B. The court's inclusion of the sentence, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," neither results in a conflict between Instructions No. 21 and No. 22, nor in any way increases the burden of proof which appellant was properly required to sustain, even under res ipsa loquitur.

If, *arguendo,* the doctrine of *res ipsa loquitur* were applicable in this case, the court's explanation to the jury (R. 23-25) nevertheless correctly states appellant's burden of proof under that doctrine.

Appellant appears to be under the impression that the shifting of the burden of going forward with the evidence, which is generally conceded to be the procedural effect of *res ipsa loquitur,* results somehow in altering the main burden of proof imposed upon the plaintiff in a negligence action.* Such a conclusion could only result from a misunderstanding of the effect of the doctrine of *res ipsa loquitur.* In *Union Pac.R. Co. v. De Vaney* (9 Cir. 1947) 162 F.2d 24, this court has recently recognized the proper rule, that the burden of proof of both negligence and proximate cause remains with the plaintiff throughout the case (p. 26):

> "Appropriately we may add that the burden of proving this case always remains with plaintiff as, even

*In Instruction No. 22 (R. 41-42) and in the court's explanation thereof to the jury (R. 23-24) it was made clear to the jury that the defendants had the burden of going forward with the evidence.

> with the aid of the doctrine, the plaintiff continues under the duty of convincing the fact finder that the injury resulted from negligence and the defendant was guilty of the negligence."

This rule has been adopted by the United States Supreme Court in *Sweeney v. Erving* (1913) 228 U.S. 233, where the court quoted with approval the following language (p. 241):

> "Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence."

The same rule was applied in these recent decisions:

Century Indemnity Co. v. Arnold (2 Cir. 1946) 153 F.2d 531, certiorari denied (1946) 326 U.S. 854;

Capital Transit Co. v. Jackson (App. D.C. 1945) 149 F.2d 839, certiorari denied (1945) 326 U.S. 762.

In the case of *Nashville, C. & St. L. Ry. Co. v. York* (6 Cir. 1942) 127 F.2d 606, the court specifically approved of an instruction which directed that, in order to find for the plaintiff, the jury must find that the plaintiff has shown by a preponderance of the evidence that the defendant's negligence was the proximate cause of the defendant's injury, even where *res ipsa loquitur* applies.

The courts of California, which appellant has cited as authority to sustain his contention, are in accord with the rule just mentioned. Thus, in *Scarborough v. Urgo* (1923)

191 Cal. 341, 216 Pac. 584, the California Supreme Court stated (p. 349):

> "Each of the following cases also holds, either expressly or by necessary implication that, where the court gives an instruction embodying the doctrine of *res ipsa loquitur,* it should also give one to the effect that the burden of proving his case by a preponderance of the evidence rests upon the plaintiff. (*Cody v. Market St. Ry. Co., supra; Valente v. Sierra Ry. Co.,* 151 Cal. 534, 537 [91 Pac. 481]; *Patterson v. San Francisco etc. Ry. Co., supra; Bonneau v. North Shore R. R. Co., supra; Wyatt v. Pacific Elec. Ry. Co.,* 156 Cal. 170, 175 [103 Pac. 892]; *Diller v. Northern California Ry. Co.,* 162 Cal. 531, 537 [Ann. Cas. 1913D, 908, 123 Pac. 359]; *Slaughter v. Goldbery, Bowen & Co.,* 26 Cal. App. 318, 328 [147 Pac. 90]; *Weaver v. Carter,* 28 Cal. App. 241, 247 [152 Pac. 323].)"

In a very well reasoned opinion, Chief Judge Lehman of the New York Court of Appeals in *George Foltis, Inc. v. City of New York* (1941) 287 N.Y. 108, 38 N.E.2d 455, pointed out that *res ipsa loquitur* does not mean that the plaintiff can recover without sustaining the burden of proving negligence by a fair preponderance of the evidence (p. 459):

> "In such circumstances the doctrine of res ipsa loquitur relieves a plaintiff from the burden of producing direct evidence of negligence, but it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault."

As the reasoning of this opinion indicates, *res ipsa loquitur* affects only the *means* of proof, that is, circum-

stantial as distinguished from direct evidence, rather than the *burden* of proof, that is, by a fair preponderance of the evidence.

Nor is there validity to appellant's contention that there is a conflict between Instructions No. 21 and No. 22. In arguing a conflict, appellant cites *Oettinger v. Stewart* (1943) 137 P.2d 852 (not officially reported), and *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 143 P.2d 929. Neither of these cases involved a situation like the instant one, in which there were at least nine separate instrumentalities under appellant's own control that may have caused the fire (infra, pp. 26-27). Before *res ipsa loquitur* could serve to raise an inference of negligence under any theory, it was necessary for the jury to conclude that these instrumentalities were not causative factors. In such circumstances, it would be preposterous to say that the mere fact the fire happened, considered alone, would support an inference of negligence. The court properly and necessarily instructed that the mere happening of the fire, *considered alone,* did not support such an inference (Instruction No. 21, R. 40-41); and further instructed that *if* the jury found the instrumentalities under appellant's control did not cause the fire, *then* an inference of negligence arose, which must be rebutted by defendants (Instruction No. 22, R. 41-42).

The Court of Appeals for the District of Columbia has recently held:

> "We find no error in the other respects in which appellant asserts error. The instruction as to the inference of negligence is perhaps inartistic as it

appears on the printed record. In effect, however, the court said that the evidence was sufficient to justify an inference of negligence if the jury believed the evidence and determined that the inference was warranted; it specifically said that no presumption of negligence whatever arose from the mere happening of the accident'' (*Earle Restaurant v. O'Meara* (App. D.C. 1947) 160 F.2d 275, 278).

C. Not having objected to Instructions No. 21 or No. 22 at the trial, appellant cannot now be heard to claim that their effect was to confuse or mislead the jury.

We have shown that the Explanation appended by the trial court to Instruction No. 22 is a correct statement of the law and in no way altered or affected the burden of proof which the instruction itself properly imposed upon appellant. The instruction clearly states that a verdict for the plaintiff may be warranted if the inference ''that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant'' preponderates over contrary evidence, or if there exists no contrary evidence. The portion of the Explanation to which the appellant objects states no more than this, despite his contention that the Explanation had the effect of ''changing'' the burden of proof.

This being the case, appellant's objection to the Explanation amounts to nothing more than a belated attempt to object to instructions to which he had previously assented. Appellant will not now be heard to offer an objection not made at the trial by the device of objecting to an Explanation which in no way altered, amended or modified the effect of the instruction to which it refers.

Nor can the giving of this explanation to the jury be assigned as error at all, as appellant did not at the trial state his grounds for objection.

III. EVEN IF RES IPSA LOQUITUR WERE APPLICABLE, THE JURY WAS NOT COMPELLED TO ACCEPT THE INFERENCE OF DEFENDANT'S NEGLIGENCE AND, IN ANY EVENT, ADEQUATE REBUTTAL EVIDENCE EXISTS TO SUSTAIN THE VERDICT. THE VERDICT THEREFORE CANNOT BE DISTURBED ON APPEAL.

Appellant cites several decisions by the courts of California to the effect that where *res ipsa loquitur* has been applied to a case, the inference which arises in the plaintiff's favor is one which cannot arbitrarily be dismissed by the jury but must be weighed and considered against the evidence presented by the defendant. The relative weight which the jury shall give to the inference still depends upon the probative strength of the facts which give rise to it, the right and duty of the jury being "to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds" *(Anderson v. I. M. Jameson Corp.* (1936) 7 Cal.2d 60, 66, 59 P.2d 962). In one of the cases cited by appellant in support of his contention, *Druzanich v. Criley* (1942) 19 Cal.2d 439, 122 P.2d 53, the California Supreme Court said (pp. 444-445):

> "The application of the doctrine does not give a plaintiff an absolute right to a judgment in every case. *(Raymer v. Vandenbergh,* 10 Cal. App. (2d) 193 [51 Pac. (2d) 104]; *Nicol v. Geitler,* 188 Minn. 69 [247 N. W. 8]; *Sweeney v. Erving,* 228 U. S. 233 [33 Sup. Ct. 416, 57 L. Ed. 815].) It does not shift the burden

> of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled. *(Anderson v. I. M. Jameson Corp.,* 7 Cal. (2d) 60 [59 Pac. (2d) 962]; *Scarborough v. Urgo,* 191 Cal. 341 [216 Pac. 584] * * *.)''

It is one thing to contend that a jury may not arbitrarily disregard pertinent evidence having an inherent probative character, whether the evidence be direct or circumstantial; it is quite another thing to contend that a certain inference, once established, *compels* the jury to a specific verdict. In *Rocona v. Guy F. Atkinson Co.* (9 Cir. 1949) 173 F.2d 661, this court recently applied the rule of *Sweeney v. Erving* (1913) 228 U.S. 233, which states that if an inference of negligence arising out of *res ipsa loquitur* is justified it will *support,* but not *require,* a finding of negligence. In *Nashville, C. & St. L. Ry. Co. v. York* (6 Cir. 1942) 127 F.2d 606, the Court of Appeals for the Sixth Circuit stated that the circumstantial evidence arising out of the inference ''must be weighed, but not necessarily accepted as sufficient; that explanation or rebuttal is called for, though not necessarily required; that a case for the jury is made, though the jury verdict is not forestalled; that the defendant's general issue is not converted into an affirmative defense * * *'' (p. 608).

It is clearly within the province of the trier of facts to determine the relative weight of the evidence presented by both parties. Appellant here challenges that the evidence presented by defendants is insufficient to overcome the inference of negligence, to which appellant claims

he is entitled by the facts of this case. If *res ipsa loquitur* were applicable, the evidence effectively rebuts any inference that any negligence of Nielson was the proximate cause of the fire.

The testimony of Nielson amply shows that he did exercise reasonable care under the circumstances while delivering the gasoline. Prior to the delivery of gasoline to each storage tank the truck motor was shut off (R. 409-413). Each time that he connected the delivery hose to the supply tank, Nielson was careful to use the wrench in tightening the connection as a precaution against spillage (R. 414, 415). Upon completion of the delivery of gasoline into each storage tank, he elevated the hose in order that it might drain completely (R. 410-415). Any alleged negligence arising from the fact that Nielson entered the barroom while the outside storage tank was being filled could have no bearing upon the cause of the fire, since the fire did not start until at least fifteen minutes had elapsed (R. 441) after he returned to the truck. During that time delivery was completed, and the hose was disconnected from the truck and drained (R. 416). The court's Instruction No. 23 (R. 43) gave the jury ample opportunity to consider Nielson's absence as negligence. The verdict is sufficient demonstration that any such conduct was *not* the proximate cause of the fire.

Appellant raises in passing (Br. 27) one other suggested basis for negligence of Nielson: the lack of testimony that he made any determination there were no sources of ignition present during the delivery of gasoline. The only possible sources of ignition suggested by any evidence in the record are the exhaust pipe of the truck

and the numerous instrumentalities under the plaintiff's own control upon his premises. The motor of the truck could not have been a source of ignition as it was turned off during the delivery of the gasoline (R. 409-413). The testimony of the witness Ryan excludes the truck's exhaust pipe as a source of ignition (R. 503-505), as ordinary common sense would exclude it, in view of the time that had elapsed between the arrival of the truck at plaintiff's premises and the occurrence of the fire. The motors operating the gasoline pumps were excluded, since they were covered (R. 169) and, in any event, were kept switched off except when gasoline was actually being dispensed through the pumps (R. 169-170). Defendant's evidence also negatived any possibility of spontaneous combustion (R. 501).

This suggestion of negligence—if indeed it be seriously made by appellant—amounts then to an assertion that it was Nielson's duty minutely to inspect the premises of plaintiff each time he made a delivery of gasoline and ascertain that nowhere on those premises was any device that could possibly ignite gasoline vapor. The existence of any such duty would mean that the business of delivering gasoline could not be carried on. That there is no such duty is well established.

Fritsch v. Atlantic Refining Co. (1932) 307 Pa. 71, 160 Atl. 699;

Allegretti v. Murphy-Miles Oil Co. (1936) 363 Ill. 137, 1 N.E. 2d 389;

Peterson v. Betts (1946) 24 Wash. 2d 376, 165 P. 2d 95.

In *Peterson v. Betts,* supra, a fire was caused at a service station by the ignition of gas fumes by defective electric wiring on the premises. In support of a judgment for the plaintiff against the oil company it was argued, as here, that the driver of the truck should have known that spilled gasoline would reach a vault on the premises where there was a defectively wired compressor. Reversing the judgment for the plaintiff, the court said, at page 104 (165 P. 2d 95, 104):

> "If it is meant by this that it was the corporation's duty to inspect the premises before making delivery of gasoline, the answer is, it had no such duty."

There is also no lack of evidence indicating a very logical cause of the fire. By a very reasonable hypothesis, the jury could assemble the following factors into a picture explaining the fire's origin. Appellant's manager Ross Moseley testified that immediately prior to the fire a wind was blowing from the southwest (R. 105, 111, 140, 141), or from the direction of the truck, toward the door of the grocery store (Pl. Exh. 6, R. 140, 141). The gas fumes dispelled through the vent pipe on the outside storage tank (R. 502) are heavier than air (R. 515, 516), and could easily have partially settled from under the canopy and blown in through this door and against the pilot light of the kerosene refrigerator. Whether this refrigerator was in operation at the time of the fire or whether it was not is a matter of conflicting evidence. Witness Warner testified that on the morning following the fire he looked inside the refrigerator and saw the remains of cooked meat (R. 483, 485). This evi-

dence is corroborated by the testimony of Moseley who admitted that he saw the same thing (R. 117, 160, 161). The presence of meat in the refrigerator would certainly justify the jury in concluding that the refrigerator *was* in operation at the time of the fire.

This hypothesis is strengthened by Nielson's testimony that he first saw flames under the overhead canopy (R. 422), which could easily be explained by a flash back from an ignition within the grocery store (R. 509). If the kerosene refrigerator were not in operation, there were numerous other appliances of appellant that could have served as the source of ignition (infra, pp. 26-27).

It is submitted that more than sufficient evidence was introduced, both as to the proper care exercised by Nielson and as to a reasonable explanation of the origin of the fire from a cause other than any negligence of Nielson, to rebut any inference that Nielson's negligence was the proximate cause of the fire. At the very least, under the authorities above cited, the jury was entitled to weigh this evidence against the inference, and its verdict, having a reasonable basis, cannot be disturbed on appeal.

IV. THE TRIAL COURT COMMITTED NO ERROR IN PERMITTING WITNESS RYAN TO TESTIFY CONCERNING A FUNDAMENTAL ISSUE OF THE CASE, SINCE HIS ANSWER WAS IN RESPONSE TO A QUESTION WHICH WAS PROPERLY BASED ON FACTS TO WHICH PLAINTIFF HAD MADE NO PREVIOUS OBJECTION.

Appellant assumes throughout his argument on point IV of his Specification of Errors that the question to

which he objects is not a hypothetical question. He assumes further that "the record conclusively shows" that the question was improperly based upon witness Ryan's "hearing and observation of the testimony already offered in the case" (Br.34). This latter assumption is apparently drawn from the fact that a prior question asked the witness to base an opinion upon "your hearing and observation of the testimony already offered in this case" (R.522). An objection to this question was sustained by the court (R.522) and the question was not answered. Appellant suggests that counsel for Standard framed the very next question on the same basis, which the court had already found to be erroneous. Such an assumption does violence to the plain meaning of the question and, we submit, attempts to give this court an impression of the question and answer based on lifting them out of the context in which they properly belong. This context was in the minds of the jury during the trial and for proper consideration by this court should be set forth at this point.

The record amply bears out the fact that the question objected to is simply one of a series of at least six questions, asked of witness Ryan, relating to possible causes of the fire. Appellant had been unable to establish the cause and defendants had introduced evidence from which the jury could conclude that the fire had been caused by some instrumentality on the plaintiff's premises. The possibilities included the pilot light of the kerosene refrigerator (R.140), defective panorama movie machine (R.212-214), butane hot water tank in the basement (R.343), pilot light on a butane stove

(R.372-373), electric wiring (R.125), power plant (R.125), motor for the barroom refrigerator (R.373), motor in the music machine (R.373-374) and motor in the basement for the beer box (R.374).

Expert witness Ryan was first questioned to determine whether spontaneous combustion could have caused the fire (R.501). The answer was in the negative. He was then asked whether an open flame would ignite gasoline vapors, to which the witness replied in the affirmative (R.501). Next the witness was asked to assume certain hypothetical facts based upon the evidence and to state whether the exhaust pipe of the truck would ignite gasoline vapors. The response was in the negative (R.502-505). Assuming the same hypothetical facts and, in addition, the presence of flames under the canopy, the witness next stated that the vapor on top of the truck would be ignited. An objection by plaintiff to this question was first made and subsequently withdrawn (R.507-508). The fifth question assumed the same truck and conditions as before, and asked whether a pilot light burning within the doorway could ignite the vapor. The witness replied in the affirmative. No objection was raised to the question or answer, but an explanatory statement of the witness was subsequently stricken (R. 509, 510). After objection was sustained to a question based on the witness's hearing and observation of the testimony, the final question on this subject, and the one of which appellant now complains, was: "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?" (R.522). It should be noted that the witness

had already testified, without objection, to substantially the same effect (R.501):

> "Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?
>
> A. Well, heat in some form; we will say a flame or a spark or a hot surface.
>
> Q. A hot surface?
>
> A. That's right.
>
> Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?
>
> A. That is correct."

Also, the witness had already testified in answer to a hypothetical question based upon the evidence that the exhaust pipe of the truck would not ignite gasoline vapors (R.502-505); and the evidence is that the truck's motor was not running (R.413).

It is true that in the body of the question, of which appellant now complains, all the facts creating the hypothesis are not stated. But the previous questions, which elicited the expert knowledge of the witness, had incorporated facts based upon evidence in the record. Clearly there was no need to repeat them here. The question was cumulative and by way of summary of those going before and not objected to. The jury unquestionably understood the nature of the question and the hypothetical facts upon which it and the preceding questions answered by the witness were based. They were entitled to the benefit of the expert witness's opinion on the subject.

Under the circumstances, if counsel for appellant had believed at the trial that the answer to this question would be confusing to the jury or prejudicial to his client, he could easily have inquired extensively on recross examination into the basis of the witness's answer.

People v. Pacific Gas & Elec. Co. (1938) 27 Cal. App.2d 725, 81 P.2d 584;

Ulm v. Moore-McCormack Lines (2 Cir.1940) 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 313 U.S. 567.

Appellant remained silent, however, on recross examination except to inquire about the flash point of gasoline (R.523).

Appellant appears to have objection to the fact that the question called for a "positive and unqualified opinion on the fundamental and basic question in the entire case" (Br.39). It is not objectionable that a question seeks an expert's testimony concerning the fundamental issue of a case.

Travelers Ins. Co. v. Drake (9 Cir.1937) 89 F.2d 47;

Mutual Benefit Health & Accident Ass'n. v. Francis (8 Cir.1945) 148 F.2d 590.

Finally, there could have been no prejudice to appellant in view of the court's instruction fully explaining the jury's right to reject evidence of expert opinion (Instruction No. 20, R.39-40):

> "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and

experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound."

CONCLUSION.

We respectfully submit the judgment below should be affirmed.

Dated, San Francisco, California,
March 1, 1951.

Respectfully submitted,
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